

ESTATE OF WILLIAM BIGHEART, JR.

Decided September 4, 1969

IA-T-21 (Supp.)

Indian Probate: Secretary's Authority: Generally--Indian Probate: State Law:
Applicability to Indian Probate, Testate

The Secretary of the Interior has by express terms reserved to himself the power to waive and make exceptions to his regulations affecting Indian matters and, further, has the inherent power, notwithstanding the absence of specific regulations so providing, to reopen and review administrative determinations purporting to be final.

United States
Department of The Interior
Office of The Solicitor
Tulsa Region
P. O. Box 3156
Tulsa, Oklahoma 74101

IA-T-21 (Supp.)

September 4, 1969

Estate of William Bigheart, Jr.	:	Request for Reopening
deceased Unallotted Osage	:	
	:	Denied

On August 19, 1969, Velma Rose Bigheart, widow of William Bigheart, Jr., deceased Osage Unallottee, acting through her attorney, Shockley T. Shoemake, Pawhuska, Oklahoma, filed with the Regional Solicitor a pleading designated "Petition For Rehearing And Notice Of Intent To Appeal," bearing a certificate that a copy thereof was mailed to opposing counsel, the Superintendent of the Osage Agency, the Secretary of the Interior, the Under Secretary of the Interior, and the Commissioner of Indian Affairs. By this petition the appellant seeks a rehearing on the decision of the Regional Solicitor (IA-T-21, August 8, 1969) which affirmed the decision of the Superintendent Osage Agency, Bureau of Indian Affairs, Pawhuska, Oklahoma, approving the will of the decedent, dated June 27, 1967, and a codicil thereto dated July 7, 1967. In addition, petitioner requests that the Regional Solicitor, in the event a rehearing is denied, or the decision on rehearing is adverse to her, fix the time within which an appeal may be taken under the provisions of 25 U.S.C. 1.

Inasmuch as said decision of August 8, 1969, was the decision of the Secretary, made for him under existing delegations of authority from him to the Solicitor 1/ and redelegation of that authority from the Solicitor to the Regional Solicitor, 2/ the only relief available to the petitioner is to consider the petition as a request for reopening the administrative proceedings. 3/ The regulations pertaining to Osage will approval proceedings 4/ do not provide for such reopening. However,

1/ 210 DM 2.2 (24 F.R. 1348): "Authority in Specified Matters. A. The Solicitor is authorized to exercise the authority of the Secretary:

. . . .

(3) Relating to Indian probate proceedings as follows:

(a) Disposition of appeals to the Secretary in proceedings for the determination of heirs or the approval of wills of deceased Indians.

(b) Extension of time or waiver of time limitations with respect to rehearings, reopenings, or appeals in proceedings for the determination of heirs or the approval of wills of deceased Indians."

210 DM 2.3 (24 F.R. 1349): "Authority to redelegate. The Solicitor may, in writing, redelegate or authorize written redelegation of any authority delegated to him in this chapter."

2/ Solicitor's Regulation 23 (31 F.R. 4631): "The . . . Regional Solicitors may exercise all the authority vested in the Solicitor of the Department of the Interior by 210 DM 2.2A(3), relating to Indian probate proceedings . . ."

3/ Estate of Joseph Cannon, IA-T-19 (Supp.), March 7, 1969.

4/ 25 CFR 17.1 - 17.14.

as was observed in the Estate of Ellen Fitzpatrick, ^{5/} the Secretary has by express terms reserved to himself the power to waive and make exceptions to his regulations affecting Indian matters, ^{6/} and further has the inherent power, notwithstanding the absence of specific regulation so providing, to reopen and review administrative determinations purporting to be final. ^{7/} The "Petition For Rehearing And Notice Of Intent To Appeal" will therefore be considered here as a request to the Secretary that he waive the absence of a regulation providing for reopening of Osage will approval cases, and disposition of that request for reopening will be made herein under the aforementioned delegations of authority.

^{5/} IA-T-5 (Supp.), November 5, 1968.

^{6/} 25 CFR 1.2: "The regulations in Chapter I of Title 25 of the Code of Federal Regulations are of general application. Notwithstanding any limitations contained in the regulations of this Chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in Chapter I of Title 25 of the Code of Federal Regulations in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians."

^{7/} Lane v. Mickadiet, 36 S.Ct. 599 (1916); Peoria Tribe v. Wea Townsite Co., 117 F.2d 940 (10th Cir. 1941); Hanson v. Hoffman, 113 F.2d 780 (10th Cir. 1940); Nimrod V. Jandron, 24 F.2d 613 (D.C. Cir. 1928); Dixon v. Cox, 268 F. 285 (8th Cir. 1920); Estate of Joseph Cannon, IA-T-19 (Supp.) (March 7, 1969); Estate of Edward Leon Petsemoie, IA-T-10 (Supp.) (May 29, 1968); Estate of Inez (Agnes) Gayton King, IA-D-1 (Supp.) (February 3, 1967); Estate of Ute, IA-143 (August 25, 1955); Estate of Meshach (Mace) Tipton, IA-41 (January 19, 1951); Estate of Sara Chah-se-nah, IA-2 (June 29, 1950).

As was further observed in the Estate of Ellen Fitzpatrick, *supra*, the few instances in which the Secretary has granted the extraordinary relief of reopening Indian probate proceedings involved either fraud ^{8/} or failure to conduct the proceedings in the manner required by statute and regulation. ^{9/} Furthermore, most requests for reopening, too numerous for citation here, have been denied. The power to reopen ordinarily “will be exercised only when some new factor, such as newly discovered evidence or fraud, is brought to the Secretary’s attention.” ^{10/} The Secretary has declined to waive the regulations and reopen a proceeding after a lapse of many years even where it appeared on the face of the record that an error of law was committed in the initial proceeding. ^{11/} In another proceeding,

^{8/} Lane v. Mickadiet, 36 S.Ct. 599 (1916); Mickadiet v. Payne, 269 F. 194 (D.C. Cir. 1920), *aff’d mem.*, 42 S.Ct. 381 (1922) (decree of adoption secured by fraud).

^{9/} Entry of order based on inadequate record: Nimrod v. Jandron, 24 F.2d 613 (D.C. Cir. 1928); Estate of Sarah Malewind, 53 I.D. 519 (1931); Entry of two contradictory orders for estate of one decedent: Estate of Gi we bi nes i kew, IA-D-19 (March 1, 1968); Entry of order for estate of living person: Estate of Es sun sey, IA-D-16 (December 21, 1967); Entry of order without notice to minor or incompetent not represented at hearing: Estate of Sam Shawagon, IA-D-10 (August 4, 1967); Estate of Betty May Black Garcia, IA-P-3 (July 21, 1967); Estate of Es Sun E Cly, IA-1278 (June 29, 1966); Entry of order without notice: Estate of George Squawlie, IA-1231 (April 5, 1966); Entry of order without notice or hearing: Estate of Kneale Blackbird, IA-62 (February 19, 1952).

^{10/} Estate of Sara Chah-se-nah, IA-2 (June 29, 1950).

^{11/} Estate of Charles Ellis, IA-1242 (April 14, 1966).

while recognizing the probable validity of the petitioner's claim, the Secretary declined to reopen because the "public interest requires that proceedings relating to the probate of Indian estates be brought to a final conclusion sometime in order that the property rights of the heirs or devisees may be stabilized." 12/

The petitioner had notice of, and was represented by counsel at, all stages of this proceeding. She had ample opportunity to refute the case for approval of the will established in the record but did not do so. No departure from the required manner of conducting the proceedings, comparable to the departures enumerated in footnote 9, is reflected by the record. The petitioner does not allege, nor does the record tend to prove, fraud. These circumstances do not justify waiving the regulations and reopening the administrative proceedings.

It should be noted, moreover, that the precedents cited for permitting reopening involved non-Osage estates in proceedings conducted pursuant to 25 CFR 15.0 - 15.34, which provide for the administrative performance, without further judicial proceedings, of the entire probate function of determining heirs, approving or disapproving wills and claims, and ordering distribution of estates of decedents. This differs substantially from the situation here involving proceedings which, having been conducted pursuant to 25 CFR 17.1 - 17.14 applicable to Osage wills, are limited to approval or disapproval of wills,

12/ Estate of Abel Gravelle, IA-75 (April 11, 1952); accord, Estates of Jose Sandoval et al., IA-1337 (May 17, 1966).

at the conclusion of which the remaining probate function, including the admission of any approved will to probate, is the responsibility of a state court. The appellants in that forum will have an opportunity to prove that the will is inadmissible under applicable state probate law. Further jurisdiction thus resting in that forum, additional action to reopen the administrative proceeding would not be justified except in circumstances more compelling than those contained in the record of this appeal.

As heretofore stated, the decision of August 8, 1969, was the decision of the Secretary made by the Regional Solicitor pursuant to the delegations of authority cited in footnotes 1 and 2. There being no regulation providing for an appeal from such decision, the petitioner's request that the Regional Solicitor fix a time within which a further appeal may be taken must be denied.

Accordingly, pursuant to the authority recited in footnotes 1 and 2, the request for reopening and for the Regional Solicitor to fix the time for appeal to the Secretary of the Interior is denied.

Raymond F. Sanford
Regional Solicitor